

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 452 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MANGABHAI KHIMABHAI

Versus

STATE OF GUJARAT

Appearance:

MR SATYEN B RAWAL for Petitioner

PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 07/09/98

ORAL JUDGEMENT

1. Rule. Ld.APP Mr.M.A.Patel waives service of rule on behalf of respondent-State. By consent of parties matter is taken up for final hearing.

2. The petitioner was prosecuted in the court of Ld.JMFC, Surendranagar on the charge for having committed offence made punishable under section 66(1)(b) and

Section 85(1)(3) of Bombay Prohibition Act, 1949 (hereinafter referred to as "the Act"). That vide judgment and order dated 6.1.1995 the trial court convicted the petitioner for both the offences and ordered to undergo Simple Imprisonment of 3 months and to pay fine of Rs.500/- in default to undergo further Simple Imprisonment of 15 days in respect to conviction under section 66(1)(b) of the Act. The petitioner was also ordered to undergo Simple Imprisonment of three months and to pay fine of Rs.250/- in default to undergo further Simple Imprisonment of ten days in respect to conviction under section 85(1)(b) of the Act. That the substantive sentence of imprisonment was ordered to run concurrently.

3. That the petitioner carried the matter to Sessions Court by filing Criminal Appeal No.3/95 against the said order of conviction and sentence. That the Court of Ld.Addl.Sessions judge, Surendranagar vide judgment and order dated 4.7.98 dismissed the appeal of the petitioner and confirmed the order of conviction and sentence passed by Ld.JMFC, Surendranagar in the Cri.Case No.2363/89. The petitioner has challenged the legality, validity and propriety of the said judgments and orders in the present revision application.

4. That the prosecution case as put up before the trial court and apparent from the record could be stated as under:

(i) That on 27.6.89 at about 1300 hrs the petitioner and one Bhika Ramji were found near the Power House by the police patrolling staff attached to Surendranagar PS having smell of alcohol in their mouth and unsteady walk. That both of them were found talking meaningless. That as such both were apprehended by the police constable-Bahadursingh Majubhai and were handed over to the PSO of the police station. That a complaint was lodged against the petitioner and he was sent for medical examination and blood test. That on receipt of report from FSL and on completion of investigation chargesheet was filed in the court of Ld.JMFC. The petitioner as accused pleaded "not guilty and claimed to be tried". The trial court recorded the evidence produced by the prosecution and in consideration of oral as well as documentary evidence convicted the petitioner and sentenced as stated hereinbefore.

(ii) It appears from the record that at the trial the prosecution had examined, in all, 8 witnesses including the complainant, panchas and the medical officer. The prosecution has also proved the documentary evidence

including the certificate of clinical examination of the petitioner\accused issued by the medical officer vide Exh.11 and the report of blood test issued by the FSL vide Exh.12. That the complaint against the petitioner is proved vide Exh.14.

5. Shri S.B.Raval, Id.advocate appearing for the petitioner has assailed the impugned judgments and orders on the following contentions:

(a) That the trial court as well as lower appellate court have failed to notice the fact that there is no satisfactory evidence on record to establish the identity of the petitioner/accused as a person who was sent for medical examination and whose blood sample was extracted for clinical analysis which has resulted into miscarriage of justice.

(b) That the report of the FSL in respect to analysis of alleged blood sample of the petitioner/accused had lost the evidentiary value on account of signing the same by the authorised analyst on subsequent day to the day on which actual analysis of the said sample was carried out. That the trial court ought not to have placed reliance on such report and the lower appellate court ought to have considered the same against the prosecution and as such the impugned judgments and orders are bad in law.

(c) That in the absence of any evidence to establish the previous conviction of the petitioner/accused under the Act. The order of sentence passed by the trial court for the conviction under section 85(1)(3) of the Act is contrary to the provisions of law. That the lower appellate court has failed to appreciate the same and thereby also the impugned judgments and orders deserve to be quashed and set aside.

6. While elaborating the contentions, Mr.Raval has referred to and relied on the following authorities to support his submissions:

(i) Criminal Revision Application No.371/85(Garasiya Ghanshyamsinh Kasalsinh vs State of Gujarat) decided by this court on 20.9.91 (Coram: B.C.Patel,J);

(ii) Criminal Revision Application No.293/95(Babubhai Ranchhodbhai Chauhan vs State of Gujarat) decided by this court on 19.3.96 (Coram: S.D.Dave,J)

(iii) Criminal Revision Application No.521/77 (Ahmed Alarakbhai vs State) decided by this court on August 30, 1978 (Coram: M.K.Shah,J)

7. As against that the Ld.APP-Mr.Patel supported the judgment of the trial court and lower appellate court by contending that the present proceedings being in the form of criminal revision application that the jurisdiction is circumscribed and there is no scope for reappraisal of evidence produced before the trial court.

8. It is undisputed that the prosecution has not examined any witness who had taken the petitioner/accused to the medical officer for clinical examination and taking blood sample. Dr.Indiraben Jayantilal Joshi who was medical officer in Mahatma Gandhi Smarak Govt.Hospital, Surendranagar on 27.6.89 has deposed vide Exh.7 to the effect that one person was brought to her with the police Yadi for examination and taking blood sample. On her examination she found that the gait of the said person was steady and he was conscious, pupils were normal. That though there was smell of alcohol from his mouth he was not under the influence of alcohol. That she has taken 5 cc of blood of the said person and has kept it in a phial and had added anticoagulant as well as preservative. Thereafter the phial was sealed using her personal seal and was packed for sending the said sample to FSL at Junagadh. She has produced the police yadi and report of FSL. She has, however, stated that the thumb impression of the said person was taken by the Police constable who had accompanied him and had identified the thumb impression. That the report of her clinical examination is taken on record vide Exh.11 and the report of FSL showing result of analysis of blood sample is taken on record vide Exh.12. It is noteworthy that during her examination in chief as well as crossexamination she has not identified the accused as a person who was examined by her and from whom she has taken the blood sample.

9. In order to establish the offence made punishable under section 66(1)(b) it is obligatory for the prosecution to establish the identity of a person who is examined by the Medical Officer and from whom intravenous blood as sample is extracted by the medical officer. In the instant case, there is no satisfactory evidence to establish the identity of the accused as a person who was examined by the medical officer-Dr.Indiraben. Further more, the symptoms recorded by the medical officer in report-Exh.11 after clinical examination by the Medical

Officer of the person brought to her is contrary to symptoms deposed by other witnesses examined by the prosecution. That other witnesses have deposed that the accused was in a drunken condition. His gait was unsteady and was talking meaningless. In view of the said contradictory evidence and in the absence of any satisfactory evidence to establish the identity of the person whose blood sample was taken and sent for chemical analysis, the prosecution has failed to establish beyond reasonable doubt that the report of chemical analysis Exh.12 was of the blood sample taken from the accused and as such the accused is entitled to claim benefit of doubt.

10. That in the matter of Garasiya Ghanshyamsinh Kasalsinh vs State (Criminal Revision Application No.371/85) (supra) this court has taken a view that if there is no satisfactory evidence to establish the identity of the accused from whom sample of blood was extracted by the medical officer the accused is entitled to claim benefit of doubt.

11. That Exh.12 is the report of Chemical analysis carried out by the FSL, Junagadh in respect to blood sample sent by the prosecution. That perusal of report discloses the fact that the authorised analyst has signed the said report on 20.7.89 while the analysis of sample was carried out on 7.7.89. Under the circumstances, it is apparent from the report itself that the report was not signed on the date on which the actual analysis of the sample was carried out. Under the circumstances, though it is stated in the said report that the blood sample contained 0.135% concentration of alcohol it is of no assistance to the prosecution to establish the offence either under section 66(1) (b) or section 85(1)(3) of the Act. That in the matter of Babubhai Ranchhodbhai Chauhan vs State of Gujarat (Cri.Revn.Appln.No.2936/95 (supra) this court has followed the earlier judgment rendered in Cri.Appeal No.200/87 decided on 24.2.94(Coram: N.N.Mathur,J) and has expressed the view that such a report has no evidentiary value and could hardly be relied on to base the conviction. Following the dictum of said judgment in the instant case also it is required to be held that the prosecution has failed to establish the requisite condition in respect to offence made punishable under section 66(1)(b) and 85(1)(3) of the Act.

12. In the matter of Ahmed Alarakhabbhai vs State of Gujarat (Cri.Revn.Application No.521/77)(supra) this

court following the earlier judgment rendered by Shri M.P.Thakkar (as he then was) in Cri.Appeal No.934/68 decided on 17.8.70 has reiterated the rule that unless the blood sample (of the accused) is taken and on chemical analysis it is found to contain the concentration of alcohol in excess of prescribed percentage it can not be said that the accused had consumed liquor. That in the instant case said observations are applicable in the facts and circumstances discussed hereinabove. Further more, section 85(1)(3) prescribes punishment for a term which may extend to one month and with fine which may extend to Rs.200/- if it is a first offence and punishment of imprisonment for a term which may extend to six months and a fine which may extend to Rs.500/- if the offence is a subsequent offence committed by same accused. That in the instant case the prosecution has failed to produce any evidence to show that the petitioner/accused was previously convicted for the offence punishable under section 85(1)(3) of the Act and being prosecuted for subsequent offence. In view of the said provision sentence imposed by the trial court for the offence under section 85(1)(3) of simple imprisonment for three months is not only excessive but contrary to prescribed provisions of law, and as such, the lower appellate court ought to have considered the same.

13. On the basis of above stated discussion, the impugned judgment and order of the trial court could hardly be sustained for more than one reason as stated hereinabove. That the lower appellate court ought to have considered the same in a proper perspective and should have allowed the appeal. In such circumstances, present revision application is required to be allowed.

14. In the result, the petition is allowed. The order of conviction and sentence passed by the Ld.JMFC in Criminal Case No.2363/89 vide judgment and order dated 6.1.1995 which is confirmed by the order of the Ld.Addl.Sessions Judge, Surendranagar vide judgment and order, dated 4.7.98 in the proceedings of Cri.Appeal No.3/94 are hereby quashed and set aside and the accused is acquitted of all the charges levelled against him. That the accused is required to be set free forthwith if he is not required in anyother case. Rule is made absolute accordingly. No costs. DS permitted.

...

